IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4082 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GNANYOG EDUCATION AND WELFARE TRUST. THRO.JOINT SECRETARY - Petitioner(s)

Versus

STATE OF GUJARAT THRO.THE SECRETARY & 4 - Respondent(s)

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Appearance :
MR N.D.Nanavati for MR BP GUPTA for Petitioner(s): 1,
MR KAMAL B.TRIVEDI with Ms.Sangeeta K.Vishan, AGP for Respondent(s) : 1 to 3.
MR JJ YAJNIK for Respondent(s) : 4,
MS SRUSHTI A THULA for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 17/12/2007

ORAL JUDGMENT

1. This petition primarily challenges communication dated 20.12.2006 issued by the respondent-Authority on the basis of order / decision in the form of communication dated 29.06.2005. The case of the petitioner is that the petitioner, armed with a provisional permission from respondent No.5-University recorded vide Resolution No.70 dated 15.12.2006 was seeking a No Objection Certificate (NOC) from the respondent-Authority. For this purpose, the petitioner had already moved the respondent-Authority on 3rd November, 2006. This was followed by a reminder dated 5th December, 2006. On 20.12.2006, the respondent-Authority informed the petitioner that the NOC can be issued on the application moved by the petitioner only after the petitioner obtains affiliation for the proposed Nursing College from any University situate in the State of Gujarat.

2. Upon Notice having been issued, the respondent-Authority has appeared and filed Affidavit dated 4th April, 2007. The principal ground on which the petitioner appears to have been non-suited is stated in paragraph No.5 of the Affidavit in reply:

> *"I say that the department of answering respondent has taken the policy decision not to issue Essentiality Certificate / No Objection Certificate to the Institutions which are not affiliated with any of the Universities situated within the State of Gujarat. Since, the petitioner trust is not affiliated with any Universities situated in the State of Gujarat. Essentiality Certificate/ No Objection Certificate has not been issued. As per the policy decision, the petitioner institution that is affiliated with the University situated out side the State of Gujarat cannot be permitted to admit the students. I say that, it came to the notice of the State Government that in the stream of Medical, Paramedical and Nursing colleges/ institutions affiliated with the universities situated outside the State of Gujarat are not acting as per the guidelines of the Hon'ble Supreme Court, regarding the admission procedure and fees structure. Complaints have been received*

from the students as well as parents that these institutions are not maintaining the quality of the education and which creates adverse situation for the Government. Hence, it is decided that from 29.06.2005, Colleges / Institutions affiliated with universities situated outside the State of Gujarat shall not be issued Essentiality Certificate / No Objection Certificate. The letter also states that the said decision shall be conveyed to all the universities and said decision requires to be followed strictly. Annexed herewith and marked as ANNEXURE-R1 is a copy of the letter dated 29.06.2005. The letter dated 29.06.2005 is as per the policy decision by the Government and therefore, is legal, just and valid, which cannot be challenged by the petitioner. The petitioner is affiliated with the University which is enacted by the State of Maharashtra and hence cannot be permitted to grant admissions to the students. The act of the Government is supported by the decision of the Hon'ble Court in the matter of Rai University V/s. State of Chhattisgarh reported in 2005 (7) SCC 330. I further say that the State Government is a final authority to decide whether the Essentiality Certificate / No Objection Certificate is required to be issued or

not. Therefore, on this ground only, the petition requires to be rejected in limine".

3. Once again in paragraph No.15 of the Affidavit-in-reply, the following averments have been made:

"It is further denied that the respondent authorities have taken the decision that is in form of executive instructions.

The impugned decision is the policy decision of the State Government and not in form of executive instructions. I further say that the State Government is a final authority to decide whether the Essentiality Certificate / No Objection Certificate is required to be issued or not".

4. Thereafter, additional affidavit dated 9th May, 2007 has been tendered by the respondent-Authority wherein reliance has been placed on Article 166 of the Constitution relating to Conduct of Government Business, Rule No.15 of Government of Gujarat Rules of Business, 1990 and Instruction No.4

issued by His Excellency-the Governor under Rule No.15 of the Rules of Business to submit that:

> *"It is stated that, the decision in this subject matter is taken at the level of Secretary and Minister-in-charge of the Department. The endorsement to the aforesaid extent can be seen at the noting part of the proceedings. The original records will be produced for the perusal of this Hon'ble Court as and when necessary. Even otherwise, validity of the decision is confirmed by the Under Secretary, by filing earlier affidavit dated 04.04.2007. The decision is made applicable throughout the state without any discrimination".*

5. Pursuant thereto original file has been produced for the perusal of the Court. On 29.06.2005, the file reveals, a proposal was made in the following words:

> *"Government have taken a policy decision about 25 years ago reserving Government's right to conduct Centralized Admission for all technical courses including medical.*
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> *We have now been observing that some physiotherapy colleges affiliated to SNDT University, Mumbai have been conducting an*

admission test of SNDT University by passing our rules and directions of Hon'ble Supreme Court. Hence, the proposal may be approved".

Next to the aforesaid noting on file in the margin there is a note JSB - please issue G.R. Immediately. The initial below the noting contains the date: 30.06.2005. As requested by the Court a xerox copy of the said page containing the aforesaid noting and the endorsement have been placed on record on behalf of the respondent-Authority.

6. The learned Advocate General representing the respondent-Authority submitted that the respondent-Authority is ready and willing to consider the application dated 03.11.2006 and the reminder dated 05.12.2006 made by the petitioner and take a fresh decision without being influenced by the communication dated 20.12.2006 (Annexure-D). In so far as communication dated 29.06.2005 is concerned (Annexure-E) the learned Advocate General submitted that as the noting on the file would indicate already a policy decision had been taken by the State Government and hence, the Authority is bound to

consider the same as and when a fresh decision is taken.

7. During course of hearing the learned advocate for the petitioner has cited as many as Eight Judgments and on behalf of the respondent-Authority Three or Four Decisions have been cited but in light of the view that the Court is inclined to adopt it has not been found necessary to deal with the authorities cited on behalf of the parties.

8. The facts reveal that communication dated 29.06.2005 (Annexure-E) was issued at a stage when a proposal for approval had been moved by the Authority before the concerned Minister. As the file reveals the decision had been communicated on 30th June, 2005 and in the circumstances it is apparent that on 29.06.2005 there would be no policy decision which could see the light of the day at that stage. The learned Advocate General states that in fact the signatures of the Secretary and the Minister concerned had been affixed on 29th June, 2005 and the

Note in the margin was made by the Secretary on 30th June, 2005.

9. This submission cannot carry the case of the respondent any further for the simple reason that in any view of the matter on 29th June, 2005, the Joint Secretary, Department of Health and Family Welfare could not have issued the communication addressed to the Deputy Secretary (Medical Service) and Deputy Secretary (Ayuervedic) once a decision had been taken to issue a Government Resolution as is evident from the original file.

10. There is one more aspect of the matter. Even if a decision was taken on 29th June, 2005 with a direction to issue a G.R. on 30.06.2005, admittedly, no G.R. pursuant to the said direction had ever been issued till 4th October, 2007. Therefore, the decision remained on file and never saw the light of the day. If, as contended, by the respondent-Authority the decision reflected a public policy, all the more reason that the decision should have been made

published for knowledge and consumption of the public at large. The communication dated 29.06.2005 (Annexure-E) cannot fulfill the said requirement, namely, being available for knowledge and consumption of public at large as the said communication has merely been addressed to two Deputy Secretaries of different departments. Even if one considers the endorsement at the foot of the said communication, copies of the communication have been forwarded again to only certain departmental heads.

11. In such circumstances, it is not possible to accept the stand of the respondent-Authority that there was a policy decision in place which would not permit the respondent-Authority to consider the application moved by the petitioner. There is one more factor which goes to indicate that till 26.12.2005 the said decision had not seen the light of the day. On the said day, namely, 26.12.2005, Education Department of the State Government issued No Objection Certificate for starting a Nursing College to one J.G. College of Nursing and addressed such communication to the Secretary, Indian Nursing

Council, New Delhi. Though this action has been sought to be explained away by stating that subsequently the said communication / No Objection Certificate had been withdrawn / cancelled, the explanation loses sight of the basic issue. The decision, if one may term it to be so, stated to have been taken on 29th June, 2005, was not only not available to the public at large, but the same was not available even to other departments of the same Government. Therefore, as noted hereinbefore, it is not possible to accept the stand of the respondent-Authority that a policy decision had been taken on 29.06.2005.

12. The respondent-Authority having already accepted that a fresh decision shall be taken on the application dated 3.11.2006 and reminder dated 5.12.2006 moved by the petitioner without being influenced by the communication dated 20.12.2006, the only direction that is required to be issued is that while taking such a fresh decision the respondent-Authority shall not be influenced by the communication dated 29.06.2005 which was at best only

an intra departmental communication not reflecting any policy decision of the State Government.

13. In light of the view that the Court has adopted it is not necessary to issue any further directions. The petition is allowed accordingly in the aforesaid terms. Rule made absolute to the aforesaid extent. There shall be no order as to costs.

(D.A.MEHTA, J.)

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